THE PUBLIC UTILITY AND THE PUBLIC HIGHWAY.

THE Commonwealth and its inhabitants are greatly interested in the construction, operation and improvement of the various public utilities in the community. In order to administer to and provide for the greater number of citizens it is found advisable that these utilities be constructed upon or adjacent to a highway. The more thickly settled portions of a State will be found along these highways. In many instances it is found necessary, by reason of the many and expensive structures close to the roads, to place these utilities upon the right-of-way of the various turnpikes.

It is true that a public highway is intended for use by all classes of vehicles, whether or not such vehicles were known, or were in use at the time of the opening of the highway. The highway may be devoted to any use, not inconsistent with the main purpose, that is, travel of traffic along such highway.

The construction of such utilities along and upon a highway does not constitute an additional burden thereon. In the absence of any constitutional provision the legislature may authorize the construction of the various public utilities upon and along the turnpike, even without the consent of the county or city officials. In Ruttle *v.* Covington,[1] the Court said:

> "The Legislature has the undoubted power to authorize the construction and operation of a railroad through a city or town and upon its streets, when they are not wholly obstructed, even without the consent of the municipal legislature."

The construction and operation of a railroad, and especially an electric railroad, along a turnpike, not being an additional servitude, the legislature would certainly have full power and authority to grant the right to construct and operate such road. This permission may be granted either in the charter of the railroad or in a general act under which the railroad or other utility

[1] 10 Ky. L. Rep. 766, 10 S. W. 644.

may be incorporated. The highways are subject to legislative control and to the control of the legislature only, in the absence of any constitutional provision to the contrary.[2] In support of this view is the following quotation from the opinion in the case of Inhabitants of Burlington *v.* Penn. R. Co.:[3]

> "It is, of course, true that the public right, so far as it is concerned, is subject to the legislative control over streets. As to the public, the legislature can authorize the abandonment of a street in toto, or turn it in part over to a private enterprise. It may therefore legalize the operation of a steam railroad transversely or longitudinally over or along a highway. The legislative authority, however, must appear, either in express terms, or must flow as a necessary implication from powers expressly granted. The grant of power may be made directly by the legislature, or it may be delegated to the government of a municipality. It may be contained in the charter of a city, in the charter of a railroad or in a general statute."

In Allin *v.* Mayor of Jersey City,[4] the Court said:

> "But where the legislature, in the grant of franchises, has prescribed the rights and privileges of such a company, the city government can not qualify or abridge the force of the legislative grant. As against such a grant of franchise, beyond a reasonable regulation, the city government, as was said by Mr. Justice Reed in the Trenton Case, is powerless to interfere."

In some States, it will be found necessary to secure the consent of the county or city officials for the construction of such road, or other utility, in the highway or streets of the State. The question then arises can the city or county officials impose conditions on granting the consent. It would seem that power to construct a railroad, or other utility, according to the terms and conditions of its charter or general law, under which it was incorporated, could not be added to or varied by the act of the city or county offiicals. Certainly unreasonable requirements

---

[2] Pepper *v.* Union R. Co., 113 Tenn. 53, 85 S. W. 864; Springfield *v.* Conn. River R. Co., 4 Cush. 63.

[3] 56 N. J. Eq. 259, 38 Atl. 849.

[4] 53 N. J. Law 522, 22 Atl. 257.

could not be added. In the Court's opinion in a New York case,[5] it was said:

> "But neither the company when organized, nor the common council, could add to, or take away from, the terms or conditions provided and imposed by the commissioners. The company by its formation accepted them. The common council need not consent, but if they did, the company, so far as the city was concerned, could proceed with the undertaking according to the charter, which the State through its agents, the commissioners, had prepared for them."

In commenting upon this decision, the Court said in the case of Galveston & Western R. Co. *v.* Galveston:[6]

> "In other words, the Court held that the conditions attached, being beyond the power of the council to prescribe, were void, and that the right of occupancy given by law with the consent of the council became effective in favor of the railroad company. It was not the act of making a contract, but the exercise of a right given by law when the railroad company, by the consent of the city, entered upon the streets and constructed its tracks."

In the same case, the Court further said:

> "We have carefully re-examined the ground upon which the opinion in this case rests, and have considered the additional authorities presented by the City of Galveston on this motion, but find no reason for changing our opinion as to the proper disposition of the case. Our opinion in this case rests upon the ground that the State granted to the railroad company the right to occupy the streets of the city upon the conditions precedent that the city should consent thereto, and that, when the city gave that consent, the right to occupy the streets vested in the railroad company, and its occupancy of such streets was by authority of the State. The city had no authority, in granting its consent, to attach a condition subsequent, which in case of failure to comply, would defeat the right granted by the State which vested when the consent of the city was given. It seems to be insisted, in support of this motion, that, if the condition attached by the city to its consent be void, the grant of con-

[5] In re Kings County Elevated R. Co., 105 N. Y. 97, 13 N. E. 18.
[6] 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33.

sent is likewise void. This does not necessarily follow. A grant of land upon a condition subsequent which is void, or even illegal, does not defeat the grant itself, but the illegal or void condition will have no effect upon the rights of the parties. So in this case the validity of the condition subsequent could not affect the validity of the grant of consent on the part of the city."

In the case of Louisville *v.* Cumberland Tel. & Tel. Co.,[7] Mr. Justice Lamar, in his opinion, said:

"Under the present Constitution of Kentucky, street franchises cannot be granted for longer than twenty years, and then only to the highest bidder after public advertisement by the city authorities. But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises, but without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. * * * But, when the assent was given, the condition precedent had been performed, the franchise was perfected, and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the Statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the Company's giving a bond, and carrying the police and fire wires free of charge. * * * But the municipality could not by an ordinance impair that contract, nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the City of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a general council."

In one of the best considered cases,[8] the Court through Chief Justice Robinson in considering the operation of a steam railroad through Main Street in the City of Louisville, uses this language:

"But we cannot concur with the chancellor in the opinion that

[7] 224 U. S. 649.

[8] Lexington & Ohio R. Co. *v.* Applegate, 38 Ky. 289.

> the commonwealth could not constitutionally exert her eminent authority, to take private property for public use, through the instrumentality of the railroad company. Public roads, of all sorts, may be constructed wherever the sovereign shall be pleased to have them; and if the public choose to avail itself of the capital and liberal spirit of select persons for insuring the construction of an important highway, the persons who may agree thus to appropriate their own funds, may surely be permitted to enjoy, as some equivalent for the expenditure, the profits of tolls prescribed by law for using the road, and may be authorized to construct and preserve it by all the means which the commonwealth could constitutionally employ. * * * The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving condition of our country and our countrymen. And, therefore, railroads and locomotive steam-cars—the offsprings, as they will also be the parents, of progressive improvements—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and, therefore, more mischievous."

It seems, therefore, that the legislature having full authority to authorize the construction of a public utility upon and along a highway, no abutting property holder can complain of such construction and operation. It is but in line with the proper use of a highway, and whatever may be done by the sovereign power of the state may be done through its constituted agency, and is not the taking of private property for public use. Of course, the public utiltiy can not invade the private property of the abutting property holder, but it can require him to remove, or can itself remove at his expense, any fence or structure which encroaches upon the right-of-way of the highway. Unless the use of the highway is destroyed or unreasonably limited for the use of other vehicles, or for other methods of transportation, it can not be deemed a nuisance and be ordered abandoned by the courts.

On the contrary, any extending use, whether by new means or old, must be held to redound to the benefit of the state, com-

munity and citizens. And that it does not constitute an additional burden upon the highway is shown in many cases.[9]
In Miller v. Detroit, etc., R. Co.,[10] the court said:

> "These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied. When a man dedicates his land for public highway, or it has been condemned for that purpose and he has been compensated, it is definitely understood by him that whatever he may lawfully do within the boundary of that highway is done with the right of the lawful authority to appropriate the entire width of the highway for purposes of travel, if it shall become necessary. Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone companies, and the like, to do so, when such companies are lawfully entitled to the use of the street. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its roads should be constructed."

There are, of course, cases which hold that the city authorities may prescribe conditions to its consent to the construction of a public utility in and on its streets, but it seems to be the better opinion that they cannot impose such unreasonable conditions as would amount to a refusal of consent. The State of course desires to have all portions and all parts of its population served by improved methods of transportation and communication, and can, and should, see that this is done, and not require the public utility to submit to more than a reasonable requirement in the consent granted by, or secured of, the city or county officials. To hold otherwise would be tantamount to authorizing city officials

[9] Georgetown & L. Tr. Co. *v.* Mulholland, 25 Ky. L. Rep. 578, 76 S. W. 148; Cumberland Tel. & Tel. Co. *v.* Avritt, 120 Ky. 34, 85 S. W. 204.

[10] 125 Mich. 171, 84 N. W. 49, 84 Am. St. Rep. 569.

to withhold consent arbitrarily and thereby retard the expansion and improvement of its transportation and communication within its limits. In many States it will be found that the powers of the Fiscal Courts or County Officials are limited to the police regulation of the highway. This would mean that they have only the right to see that the utilities, either transportation or communication, are so constructed and so located as not unreasonably to interfere with the use of such highway for other proper uses.

If in granting the consent of the state or county officials to the use of the highway for these purposes, an unreasonable or illegal condition should be attached to the consent, that would not invalidate the consent, but the illegal or void condition would have no effect upon the rights of the parties.[11]

I think that all public utilities, with the consent of the State alone, in the absence of constitutional requirements to the contrary, may clearly be constructed in a proper manner and operated in a reasonable way on and along any highway in the commonwealth. But where the consent of the city or county officials is required by constitutional or legislative enactment, this consent must be given, if at all, without attaching thereto unreasonable or burdensome conditions.

Clarence Dallam.

LOUISVILLE, KY.

[11] Galveston & Western R. Co. *v.* Galveston, *supra.*